In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-670

ACCURACY IN MEDIA, INC., PETITIONER

v.

NATIONAL BROADCASTING COMPANY, INC., AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 150a-203a) is reported at 516 F. 2d 1101. The court's order of August 7, 1975, denying a petition for rehearing (Pet. App. 204a), is unreported. Prior related opinions and orders of the court of appeals, sitting by division and *en banc* (Pet. App. 34a-99a, 100a), are also reported at 516 F. 2d 1101. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 1a-33a) is reported at 44 F.C.C. 2d 1027, and the decision of the Commission's Broadcast Bureau is reported at 40 F.C.C. 2d 958.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1975. A timely petition for rehearing was denied

on August 7, 1975, and the petition for a writ of certiorari was filed on November 5, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in remanding this case to the Federal Communications Commission, at the Commission's request, in order to permit the Commission, in light of changed circumstances, to dismiss the complaint.

STATUTORY PROVISIONS INVOLVED

Relevant sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, and of Title 28, United States Code, are set forth at Pet. 3-5.

STATEMENT

On November 27, 1972, petitioner Accuracy in Media, Inc. (AIM), filed a complaint with the Federal Communications Commission charging that the National Broadcasting Company (NBC) had violated the Commission's fairness doctrine. The allegation related to NBC's presentation on September 12, 1972, of a television program entitled "Pensions: The Broken Promise" (the "program"), without presenting or affording others an opportunity to present contrasting points of view (Pet. App. 34a, 35a).

In its complaint, AIM alleged that the program had presented only negative views of the private pension system while endorsing the necessity for pension reform through legislation of the type then being considered by Congress. AIM asserted that the need for private pension reform was a controversial issue of public importance which, under the fairness doctrine, required NBC to present views in its overall programming in contrast to those expressed in the program (Pet. App. 39a-40a). In reply, NBC stated that the program had not purported to

deal with all private pension plans or to urge the adoption of any specific legislation, but rather "was designed to inform the public about some problems which have come to light in some pension plans and which deserve a closer look" (Pet. App. 40a). NBC contended that it had treated this subject, which did not involve a controversial issue of public importance, in a reasonable manner, and that it was thus under no obligation to present additional views (Pet. App. 40a-41a).

On December 3, 1973, the Commission, affirming the decision of its Broadcast Bureau, held unreasonable NBC's determination that its program did not address the issue raised in AIM's complaint and that its program did not address a controversial issue of public importance (Pet. App. 24a). The Commission therefore concluded that NBC was obligated to present a reasonable opportunity in its overall programming for contrasting views on the private pension issue (Pet. App. 25a).

On NBC's petition for review, the court of appeals stayed the effectiveness of the Commission's order pending its determination on the merits. On September 27, 1974, the court of appeals reversed the Commission in a 2 to 1 decision, holding that the Commission had erroneously substituted its judgment of the scope of the program for that of the licensee without finding that NBC's determination had been an abuse of its journalistic discretion (Pet. App. 65a). AIM then petitioned for rehearing, suggesting that the case be reheard *en banc*. That petition was granted on December 13, 1974, and the court of appeals *en banc* accordingly vacated the panel opinion and judgment (Pet. App. 99a).

On March 6, 1975, prior to oral argument before the court of appeals *en banc*, the Commission filed a suggestion that the case had become moot and should therefore be remanded for dismissal of the original complaint. While

maintaining that its views on the merits were correct, the Commission suggested that the enactment of private pension reform legislation by Congress essentially had rendered meaningless NBC's obligations under the order that was the subject of the appeal (Pet. App. 151a):

> Thus, an order of this court affirming the Commission will not result in the broadcast of additional views on the pensions issue. Similarly, an order reversing the Commission will not relieve NBC of any obligation to air additional material. Neither of the original adversaries in this dispute (NBC and AIM) nor the Commission stands to gain or lose by this Court's resolution of the case.

In light of these representations by the Commission, the *en banc* court vacated its orders of December 13, 1974, and referred the suggestion of mootness to the original panel (Pet. App. 100a). On July 11, 1975, the panel vacated its judgment of September 27, 1974, and remanded the case to the Commission with instructions to dismiss the complaint (Pet. App. 150a).[1] A petition by AIM for rehearing was denied by the court of appeals on August 7, 1975 (Pet. App. 204a).

ARGUMENT

The order of the court of appeals is correct and presents no question of general importance warranting review by this Court. Contrary to petitioner's contentions, the decision below neither conflicts with *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, nor announces either an exemption from the fairness doctrine for any type of programming or any other ruling on the merits of this dispute. Instead, the court of appeals merely concluded that the enactment of private pension reform legislation while this case was

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[1]It is of this order that petitioner seeks review by this Court.

sub judice and the Commission's order was stayed had rendered ineffective the Commission's order that NBC present views contrasting with those of the program. Consequently, the court properly concluded that the unavailability of practical relief dictated a remand to the Commission for dismissal of the complaint.

1. The intervening enactment of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829, 29 U.S.C. 1001 *et seq.*, has robbed this controversy of continuing vitality and made further judicial review inappropriate. The Commission's original determination that the program broadcast by NBC had involved a "controversial issue of public importance"—a finding that triggered the licensee's obligation to present contrasting views under the fairness doctrine—was heavily influenced by the pendency before Congress of pension reform legislation (Pet. App. 14a, n. 3, 23a). Its order therefore contemplated compliance by NBC prior to final congressional action on the pending legislation; indeed, to ensure the presentation of contrasting views in time to influence the legislative consideration, the Commission denied NBC's request for a stay of the order pending judicial review. *Accuracy In Media,* 44 F.C.C. 2d 1045. As a result of the stay granted by the court of appeals, however, the purpose of the Commission's order can no longer be accomplished.

2. This Court has often noted the rule in federal cases that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel* v. *Thompson,* 415 U.S. 452, 459, n. 10. See also *Preiser* v. *Newkirk,* 422 U.S. 395, 401; *Roe* v. *Wade,* 410 U.S. 113, 125; *United States* v. *Munsingwear, Inc.,* 340 U.S. 36. Here the Commission had indicated that enforcement of its order would not serve its intended purpose and that it considered NBC relieved of any duty to

comply (Pet. App. 151a). Thus, NBC no longer has an actual controversy with the Commission with respect to its program. Indeed, this case is similar to *DeFunis* v. *Odegaard*, 416 U.S. 312, which this Court dismissed as moot. In both cases the effect of the challenged order had been stayed, with the result that by the time of this Court's review the controversy between the parties had dissolved and the awarding of effective relief had become impossible.[2]

Nor does this case fall within the recognized exception to the mootness doctrine for controversies that are "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515. As the Court stated in *Sosna* v. *Iowa*, 419 U.S. 393, and recently reiterated in *Weinstein* v. *Bradford*, No. 74-1287, decided December 10, 1975, slip op. 3, that doctrine is limited to situations where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Neither requirement is satisfied here. The Commission frequently adjudicates complaints under the fairness doctrine and its rulings are subject to judicial review; the passage of relevant legislation during the course of this litigation was a unique event, preventing a court ruling only on this set of facts, not on the broader legal issues as posed by different facts in the future. Indeed, the Commission recently completed its *Fairness Report*, 48 F.C.C. 2d 1, in which it fully discussed its standards and procedures, including the

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[2]Unlike the situation in *De Funis*, here the changed circumstances resulted not from the action of a party but from intervening legislation. See, *e.g.*, *United States* v. *New Jersey State Lottery Commission*, 420 U.S. 371; *All American Airways, Inc.* v. *United Air Lines, Inc.*, 364 U.S. 297; *Bryan* v. *Austin*, 354 U.S. 933; *Natural Milk Producers Ass'n* v. *City and County of San Francisco*, 317 U.S. 423.

scope of review of licensee determinations, in ruling on fairness doctrine complaints, and a petition for review of the report has been filed in the United States Court of Appeals for the District of Columbia Circuit. *National Citizens Committee for Broadcasting* v. *Federal Communications Commission,* No. 74-1700. It is therefore most unlikely that the substantive fairness doctrine issues raised by AIM will evade review. Finally, while NBC is of course subject to the continuing jurisdiction of the Commission, resolution of fairness doctrine complaints depends in large part upon a determination of the precise factual situation involved. Thus, review of this decision is not required to foreclose similar disputes between the parties in the future.

3. Regardless of whether this case is moot in the jurisdictional sense, the court of appeals' order remanding it to the Commission was a proper exercise of its equitable discretion in view of the changed circumstances occasioned by the pension statute. See, *e.g., Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 172 (passage of Labor-Management Reporting and Disclosure Act of 1959 while order of National Labor Relations Board was under review "so changed the complexion of the case that * * * the reviewing equity court, in the exercise of its sound discretion, should not have affirmed the order, as it did, but should have vacated it and remanded it to the Commission for further consideration in the light of the changed conditions"); *Mobil Oil Corp.* v. *Federal Power Commission,* 417 U.S. 283, 311; *Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364, 373. Since the Commission had represented that, because of the intervening pension legislation, NBC was "no longer under any duty to comply" with its order (Pet. App. 151a), the court below properly concluded that the case should be remanded to the Commission for dismissal of the complaint.

4. Finally, petitioner's contention that the decision below conflicts with the policies set forth in *Red Lion Broadcasting Co.* v. *Federal Communications Commission, supra,* is unfounded. The court's dismissal here expressly reflected no judgment as to the substantive issues raised by the original controversy. Indeed, despite petitioner's claim that the court of appeals intended *sub silentio* to declare the fairness doctrine unconstitutional, even the court's initial decision of September 27, 1974, did not hold that the doctrine was inapplicable to the program aired by NBC. Rather, the court merely concluded that the Commission had applied an erroneous standard of review in determining whether the doctrine had been violated (Pet. App. 65a).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

BARRY GROSSMAN,
Attorney.

ASHTON R. HARDY,
General Counsel,

DANIEL M. ARMSTRONG,
Associate General Counsel,

STEPHEN A. SHARP,
Counsel,
Federal Communications Commission.

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